Quah Swee Khoon v Sime Darby Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-659 OF 1998
GOPAL SRI RAM, DENIS ONG AND HAIDAR JJCA
23 FEBRUARY 2000

Administrative Law *— Remedies — Certiorari — Application to quash decision of Industrial Court — Exercise of appellate powers — Inquires into finding of facts on crediblity of witnesses, whether an exercise of appellate functions — Finding of perversity, whether merely a guise for interfering with findings of facts*

Labour Law *— Industrial Court — Procedure — Legal result not pleaded — All facts relevant to constructive dismissal pleaded — Whether necessary to plead legal result which will inevitably follow from pleaded facts*

The Industrial Court's decision that the appellant had been constructively dismissed was quashed by the High Court on the following grounds: (i) the Industrial Court — in holding that there was a breach of an implied term of trust and confidence in the contract of employment — relied on a ground that was never pleaded or relied on by the appellant; (ii) the Industrial Court had applied the wrong test in holding that the conduct of the respondent affecting the appellant was not just and equitable; and (iii) the decision of the Industrial Court in preferring the appellant's assertions instead of the respondent's — which were corroborated by independent evidence — was perverse. The appellant appealed.

Held, allowing the appeal:

(1) The Industrial Court in holding that there was a breach of implied term leading to constructive dismissal was not adjudicating upon an unpleaded point as all the facts relevant to that point was pleaded. Only the legal result thereof was not pleaded. It is unnecessary to plead the legal result which will inevitably follow from a set of pleaded facts (see p 606B–C).

(2) The Industrial Court had applied the correct test in determining whether there was constructive dismissal, by first considering whether there was a dismissal, ie whether the appellant was driven out of employment or had he left his employment voluntarily, and secondly, whether the dismissal was with just cause or excuse in accordance with s 20(1) of the Industrial Relations Act 1967 (see pp 604C–D, 611C–D) .

(3) It is not open for a court in judicial review proceedings to exercise appellate powers. If a judge to whom an application is made for certiorari inquires into and disturbs finding of facts based on the crediblity of witnesses, he is actually exercising appellate functions. Therefore, it must be concluded that the finding of perversity is merely a guise for interfering with findings that are only capable of being corrected in the exercise of appellate jurisdiction. As such, the learned judge had clearly exceeded the

A parameters of its certiorari jurisdiction in quashing the award on this ground (see pp 606D–E, 613C, G–H).

[Bahasa Malaysia summary

B Keputusan Mahkamah Perusahaan bahawa perayu telah dipecat secara konstruktif dibatalkan oleh Mahkamah Tinggi atas alasan-alasan berikut: (i) Mahkamah Perusahaan — dalam memutuskan bahawa telah berlakunya kemungkiran dalam terma kepercayaan dan keyakinan yang tersirat dalam kontrak pekerjaan — telah bergantung pada alasan yang tidak pernah diplidkan oleh perayu; (ii) Mahkamah C Perusahaan telah menggunakan ujian yang salah dalam memutuskan bahawa kelakuan penentang yang menjejaskan perayu adalah tidak adil dan saksama; dan (iii) keputusan Mahkamah Perusahaan dalam mengutamakan pendakwaan perayu dan bukannya pendakwaan penentang — yang disokong oleh keterangan bebas — adalah menyalahi peraturan. Perayu membuat rayuan.

D

Diputuskan, membenarkan rayuan:

(1) Mahkamah Perusahaan dalam memutuskan bahawa telah berlakunya kemungkiran dalam terma tersirat yang membawa kepada pemecatan konstruktif bukannya memutuskan hujah yang E tidak diplidkan kerana segala fakta yang relevan kepada hujah tersebut telah diplidkan. Hanya keputusan sah yang berikutnya tidak diplidkan. Adalah tidak perlu untuk memplidkan keputusan sah yang pasti menyusul daripada suatu set fakta yang diplidkan (lihat ms 606B–C).

F (2) Mahkamah Perusahaan telah menggunakan ujian yang betul dalam menentukan sama ada telah berlakunya pemecatan konstruktif, pertamanya dengan mempertimbangkan sama ada terdapat pemecatan, iaitu sama ada perayu telah dipaksa berhenti kerja ataupun beliau telah meninggalkan pekerjaannya secara sukarela, dan kedua, sama ada pemecatan tersebut adalah dengan G sebab atau alasan yang munasabah menurut s 20(1) Akta Perhubungan Perindustrian 1967 (lihat ms 604C–D, 611C–D).

(3) Adalah tidak terbuka kepada mahkamah dalam prosiding kajian semula kehakiman untuk melaksanakan kuasa rayuan. Sekiranya seseorang hakim pada siapa satu permohonan telah dibuat untuk H certiorari menyiasat dan mengganggu keputusan fakta berdasarkan kebolehpercayaan saksi-saksi, beliau sebenarnya melaksanakan fungsi rayuan. Oleh itu, mestilah disimpulkan bahawa keputusan tentang menyalahi peraturan cumalah suatu kepalsuan untuk mengganggu keputusan yang hanya boleh dibetulkan dengan melaksanakan bidang kuasa rayuan. Oleh yang begitu, I hakim yang arif jelas telah melampaui had bidang kuasa certiorari dalam membatalkan award tersebut atas alasan ini (lihat ms 606D–E, 613C, G–H).]

Notes

For cases on procedure applicable in the Industrial Court, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1111–1114.

Cases referred to

Amanah Butler (M) Sdn Bhd v Yike Chee Wah [1997] 1 MLJ 750 (refd)

Ang Beng Teik v Pan Global Textiles) Bhd, Penang [1996] 3 MLJ 137 (refd)

Anwar bin Abdul Rahim v Bayer (M) Sdn Bhd [1998] 2 MLJ 599 (refd)

Goon Kwee Phoy v J & P Coats (M) Sdn Bhd [1981] 2 MLJ 129 (refd)

KEP Mohamed Ali v KEP Mohamed Ismail [1981] 2 MLJ 10 (refd)

Lever Bros Ltd v Bell [1931] I KB 557 (refd)

R Rama Chandran v Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd)

Swedish Motor Assemblies Sdn Bhd v Hj Md Ison bin Baba [1998] 2 MLJ 372 (refd)

William Jacks & Co (M) Sdn Bhd v S Balasingam [1997]3 AMR 2585 (refd)

Wong Chee Hong v Cathay Organisation (M) Sdn Bhd [1988] 1 MLJ 92 (refd)

Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal [1995] 2 MLJ 753 (refd)

Woods v WM Car Service Ltd (Peterborough) Ltd [1982] ICR 693 (refd)

Legislation referred to

Industrial Relations Act 1967 s 20(1)

Appeal from: Originating Motion No R3–25–53 of 1997 (High Court, Kuala Lumpur)

LG Seah (*Lobo & Associates*) for the appellant.
N Sivabalah (*Shearn Delamore & Co*) for the respondent.

Gopal Sri Ram JCA (delivering oral judgment of the court):

Introduction

This is an appeal brought against the decision of the learned judge in the High Court at Kuala Lumpur whereby he quashed an award of the Industrial Court that had been handed down in the appellant's favour. At the heart of this appeal, lies the vexed question whether the High Court acted within the parameters of its certiorari jurisdiction. The essence of the dispute would appear to centre on a complaint by the appellant that the learned judge had indeed exercised appellate jurisdiction in proceedings that were plainly not an appeal. The factual matrix that forms the background to this appeal may be shortly stated.

Background Facts

At all material times, the appellant was the Controller-Processing of the respondent company. According to the evidence that he gave before the Industrial Court, he was in charge of all palm oil mills operated by the respondent. On 6 August 1993, the respondent sent a memorandum to the appellant. Annexed to that memorandum was an organisation chart. That chart was later amended. But nothing turns upon the amendment. Having received these documents, the appellant took the view that he had been demoted and that his job responsibilities had been substantially reduced. He took umbrage. He wrote to the respondent on 20 August 1993 complaining about his alleged reduction in rank. In that letter, he called upon the respondent to rectify matters not later than 24 August 1993. He said that if that did not happen, he would consider himself as being dismissed from the company with effect from 25 August 1993. According to the respondent, this letter was followed by a meeting between the appellant and one Mr Lee Yew Foong (the respondent's General Manager-Engineering & Processing) on 24 August 1993. Lee gave evidence that the appellant had, at that meeting, been assured of a restoration of his position. There is in evidence a memorandum dated 1 September 1993 from Lee Yew Foong to the appellant referring to the meeting in question. However, there is also evidence to show that this memorandum dated 1 September 1993 was only received by the appellant on 3 September 1993 when the appellant called at the respondent's premises to surrender the car given him by the respondent. In the meantime, another letter had been written by the respondent's divisional director of plantations to the appellant. It is dated 1 September 1993. The appellant received it on the very next day. This letter is of some importance and for that reason, we would set out its main body below:

> I am surprised to receive your letter dated 25 August 1993 on 1 September 1993 despite Mr Lee Yew Fong's advice to you on 24 August 1993 that I have agreed to restore status quo in respect of your duties and responsibilities as Controller-Processing. As assured by Mr Lee Yew Fong he has already confirmed in writing on 1 September 1993 of his discussion with you.
>
> Under the circumstances your decision to leave the company unilaterally and on your own accord without giving the company three (3) months' notice tantamounts to abscondment of employment with the company with effect from 25 August 1993.
>
> You are hereby required to pay the company three (3) months salary in lieu of notice within two weeks from the date hereof failing which legal action will be taken to recover the sum from you.
>
> You are also hereby required to hand over the company's car to the Administration Manager by 3 September 1993.
>
> You may at any time during office hours and with prior notice to the General Manager-Engineering & Processing collect your personal effects from your office.
>
> With regard to other administrative matters, you will be formally advised by Manpower Department in due course.

Later, the appellant, true to his earlier letter, considered himself dismissed and lodged a complaint with the Director-General of Industrial Relations. Following the conciliation proceedings prescribed by s 20 of the Industrial Relations Act, 1967 ('the Act'), the dispute was referred by the Honourable Minister to the Industrial Court. After a hearing where oral and documentary evidence was led, the learned chairman of the Industrial Court handed down an award on 6 February 1997. He found for the appellant. The respondent being dissatisfied with the award moved the High Court for an order of certiorari to have it quashed. The learned judge acceded to that application. He quashed the award. It is against that decision that the present appeal has been brought.

The award

In finding for the appellant, the Industrial Court held that there had been a dismissal without just cause or excuse. This is how the learned chairman put it:

> The series of actions and the course of conduct taken by the company affecting the claimant were not just and equitable. The claimant was put in a position with an overall effect that his functions were changed and his status as a senior executive downgraded. There was a variation in the claimant's contract of employment and this was done under the pretext of reorganisation which took place twice within one year.

Later in his award, the learned chairman also said as follows:

> It is an implied term in contract of employment that an employer will not, without reasonable and proper cause, conduct himself in a manner calculated or likely to destroy the relationship of trust and confidence between them. *Woods v WM Car Service Ltd (Peterborough) Ltd* [1982] ICR 693. The court is of the view that in the circumstances of this case the acts complained of infringed such implied term. What the company did to the claimant crossed the line of legitimate reorganisation. Such attitude towards the claimant, who was a long serving senior employee of the company, commanding a salary of RM9,850 per month, was intended to humiliate the claimant into abandoning his job.

Based on these grounds, the Industrial Court arrived at the following conclusion:

> Having examined the facts and evidence of the case before the court, it is the court's finding that the claimant has established that he had been constructively dismissed and such dismissal is without just cause or excuse.
>
> The court makes the following orders:
>
> (1) The claimant be reinstated to his former position in the company without loss of benefits monetary or otherwise.
>
> (2) The claimant must report for work on or before 10 March 1997 or he shall lose the benefits of his claim.
>
> (3) Backwages from the date of dismissal to the last date of hearing shall be paid to the claimant through his solicitors Messrs Lobo & Associates.

A It is apparent from a reading of the award that the conclusions of the learned chairman were arrived at after a consideration of the oral and documentary evidence before him. Indeed, it is clear that upon matters of fact turning upon the credibility of evidence, the learned chairman preferred the testimony of the appellant to that of the respondent's witness. For example, he rejected so much of Lee Yew Foong's evidence about what had allegedly B transpired at the meeting between Lee and the appellant on 24 August 1993. A reading of the award leaves us with the clear impression that the learned chairman carefully weighed the totality of the evidence before him when arriving at his conclusion.

So much for the award.

C

The judgment

The learned judge granted certiorari principally on the ground that the Industrial Court had exceeded its jurisdiction. In the court below, the respondent advanced three grounds for suggesting that jurisdiction had D been exceeded. And the learned judge agreed with all of them. The three grounds are as follows:

(1) The Industrial Court in holding that there was a breach of an implied term of contract relied on a ground that was never pleaded or relied on by the respondent.

E (2) In holding that the conduct taken by the applicant was not just and equitable applied the wrong test in determining if there was constructive dismissal.

(3) In refusing to accept that the respondent was informed on 24 August 1993 that his position was restored failed to have regard to the clear evidence both documentary and oral that corroborated the applicant's F assertion and contradicted the respondent's assertion.

In respect of the first ground, the learned judge concluded that the Industrial Court by referring to a breach of an implied term of trust and confidence in the contract of employment between the appellant and respondent had proceeded upon an unpleaded case. In respect of the G second ground, the learned judge criticized the chairman of the Industrial Court for failing to apply the test for constructive dismissal formulated in *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92 and *Anwar bin Abdul Rahim v Bayer (M) Sdn Bhd* [1998] 2 MLJ 599. He concluded that the Industrial Court had gone wrong in what he thought was an application of the test formulated by this court in *Ang Beng Teik v Pan* H *Global Textiles) Bhd, Penang* [1996] 3 MLJ 137. Upon the third ground, the learned judge concluded that the Industrial Court was wrong to have accepted the appellant's version of the events of 24 August 1993 and held that the learned chairman should have preferred the evidence of the respondent's witness which was in fact corroborated by independent I evidence. The learned judge then concluded as follows:

> The application before me is concerned with judicial review of the Industrial Court's decision. As adverted to earlier, the Industrial Court had exceeded its

jurisdiction on the first ground and had erred in law on the second ground, and whilst the third ground, its decision is found to be perverse. A

In the premises, I allow the application for an order of certiorari to quash the Industrial Court's award with costs to the applicant.

The arguments before us

B

Ms LG Seah in support of the appeal advanced several arguments. We trust that we will be forgiven if we do not deal with all of them in this judgment. We find it convenient to summarize her arguments under two broad heads as follows.

First, the learned judge erred in holding that the Industrial Court had decided the case dehors the pleadings. The case was not adjudicated upon an unpleaded point. All the facts relevant to the point at issue had been pleaded. It is only the legal result that had not been pleaded. It is not necessary, even at common law, to plead the legal result flowing from a set of pleaded facts. There had been written argument about the legal result. Since all the relevant evidence was before him, the learned chairman acted with propriety in holding that there had been a breach of the implied term in question. C D

Secondly, the learned judge was in truth and in fact exercising an appellate function. He reviewed and disturbed findings of primary fact based upon the credibility of evidence. It is not open for a court in judicial review proceedings to exercise appellate powers. The finding of perversity is merely a guise for interfering with findings that are only capable of being corrected in the exercise of appellate jurisdiction. The authorities are against the approach taken by the learned judge. So much for the arguments taken by the appellant. E

For the respondent, Mr Sivabalah, with his usual persuasive style, has drawn our attention to several paragraphs in the award in which he says the Industrial Court plainly made findings in his client's favour. These passages are to be found in the early part of the award. Counsel draws strong support from the language employed by the Industrial Court in these passages. Mr Sivabalah asks: how could it possibly happen that a finding in his client's favour made early in the award could possibly be followed by a conclusion going the opposite way? It follows, he says, that the award is bad for perversity. For, one cannot have a finding both for and against the same party upon the same issue in one and the same award. F G

Counsel has further argued that the learned judge was entirely correct in the approach he took when arriving at his conclusion. It was submitted that the judge's approach is supported by high authority, including decisions of this court. H

So far as the pleading point is concerned, Mr Sivabalah repeated before us the arguments he had advanced in the court below. In summary, they amount to this. The implied term point was a specific allegation. It has nothing to do with the case as formulated by the appellant in his pleading. If a finding was called for, then there ought to have been a specific plea of the implied term governing trust and confidence. Although the procedure I

in the Industrial Court is fairly lax, this does not mean that it is open to the Industrial Court to adjudicate upon unpleaded issues.

We must now turn to address the crucial issues arising from the arguments of counsel.

The pleading point

We will begin by dealing with the arguments on the point of the pleaded case. For this, it is necessary to set out *in extenso* the pleadings of the respective parties.

First, the statement of case which contains the following allegations:

1 The parties to the dispute are Sime Darby Plantations (hereinafter referred to as 'the company') and Encik Quah Swee Khoon (hereinafter referred to as 'the claimant') who joined the services of the company on 2 October 1978.

2 The claimant hereby applies to join Sime Darby Berhad as a party to these proceedings since it is the corporate entity that employed the claimant.

3 The dispute is over the dismissal of the claimant from the service of the company as its Controller-Processing. The claimant's last drawn salary was RM9,650 per month. The claimant was also entitled to the following:

(a) company maintained car; and

(b) other fringe benefits

3.1 The claimant was at all material times the Controller-Processing of the company in which capacity he was in charge of all palm oil mills of the company with subordinates reporting to him.

3.2 By letter dated 6 August 1993, the claimant's post and job functions were downgraded to be in line with his former subordinates. A copy of the letter with the annexures is enclosed herewith as exh 'C-1'

3.3 Subsequently the organisation chart in exh C-1 was amended and sent to the claimant. A copy of the said chart is annexed hereto marked 'C-2'.

3.4 By letter dated 20 August 1993, the claimant wrote to the company on the matter. A copy of the letter which is self-explanatory is annexed hereto marked 'C-3'.

3.5 The company did not rectify matters as required by the claimant in exh C-3 under the circumstances the claimant considered himself dismissed with effect from 25 August 1993.

3.6 The claimant contends and will contend at the hearing that the said dismissal is ipso facto without any or any just cause or excuse.

3.7 Further or in the alternative the claimant will contend that the said dismissal is contrary to the principles of natural justice, equity, good conscience and an unfair labour practice which ought to be struck down as such by the court.

3.8 The claimant therefore prays for reinstatement to his former position in the company without loss of any benefits monetary or otherwise whatsoever.

Next, the statement-in-reply which reads as follows: A

1.1 The parties to the dispute are Sime Darby Bhd (hereinafter referred to as 'the company') and Quah Swee Khoon (hereinafter referred to as 'the claimant') who joined the services of the company on 2 October 1978.

1.2 Sime Darby Plantations is a division of the company. Sime Darby Plantations does not possess any corporate or legal identity of its own. B

1.3 By reason of the foregoing, the company shall apply to amend the name of the employer in the title of the action from 'Sime Darby Plantation' to 'Sime Darby Bhd'.

1.4 The dispute is over the resignation of the claimant from the services of the company as its Controller-Processing. The claimant's last drawn salary was RM9,650 per month. Paragraph 2 of the Statement of Case is C admitted to the foregoing extent only.

2.1 The claimant was at all material times the Controller-Processing of the company responsible for, inter alia, palm oil mill operations.

2.2 The claimant in turn reported to the General Manager-Engineering and Processing, who was overall in charge of engineering and processing.

2.3 For purposes of better co-ordination and accountability, it was decided D to streamline the line-management of the mills. Accordingly, by a circular dated 6 August 1993, the new Mill Managers Reporting Line was implemented. The claimant received the circular on 7 August 1993. A copy of the aforesaid circular has been annexed to the statement of case and marked as exh 'C-1'.

2.4 Exhibit 'C-1' was not a downgrading of the claimant's post and job E functions.

2.5 The claimant expressed no objections to exh 'C-1' until he wrote his letter dated 20 August 1993 to the Divisional Director of the company which was only received on 23 August 1993.

2.6 On 24 August 1993, the claimant was informed by the General manager- F Engineering & Processing, that his scope of works and responsibilities as Controller (Processing) was restored and that he would continue to supervise all the Mills, Rubber and Cocoa Factories and Sime Rubberwood Factory. The claimant was further informed that this would be confirmed in writing and a new circular to that effect would be issued after the General Manager-Engineering & Processing returned from the G company's Management Conference in Penang.

2.7 Upon his return from Penang, the General Manager — Engineering & Processing issued the claimant with the letter dated 1 September 1993 confirming the matters set out in the foregoing Para 2.6. A copy of the aforesaid memo dated 1 September 1993 is annexed hereto and marked as exh 'C-1'. H

2.8 Pursuant to exh 'C-l', two circulars dated 1 September 1993 were issued by the General Manager-Engineering & Processing. Copies of the aforesaid circulars dated 1 September 1993 are annexed hereto and marked as exhs 'C-2' and 'C-3'.

2.9 Notwithstanding the foregoing, the company on 1 September 1993 received the claimant's letter purportedly dated 25 August 1993. I

2.10 Accordingly, by a further letter dated 1 September 1993 from the company, the claimant was informed that his decision to unilaterally

leave the company was tantamount to abandonment of his employment with the company. A copy of the aforesaid letter dated 1 September 1993 is annexed herewith and marked as exh 'C-4'.

3.1 Para 3.1 of the statement of case is admitted.

3.2 Save that the claimant was issued with a letter dated 6 August 1993 (annexed to the statement of case as exh 'C-1'), para 3.2 of the statement of case is strictly denied and the claimant is put to strict proof thereof.

3.3 Para 3.3 of the statement of case is admitted.

3.4 Para 3.4 of the statement of case is admitted. The contents of the aforesaid letter dated 20 August 1993 (annexed to the statement of case, exh 'C-2')is strictly denied and the claimant is put to strict proof thereof.

3.5 Para 3.5 of the statement of case is strictly denied and the claimant is put to strict proof thereof.

4 Para 4 and 5 of the statement of case are strictly denied and the claimant is put to strict proof thereof.

5 The company contends that the claimant has, in law, resigned on his own accord.

6 Wherefore the company prays that the claimant's claims be dismissed.

7 Save as is hereinbefore expressly admitted, the company denies each and every allegation set out in the statement of case as if the same were separately set out herein and traversed seriatim.

A reading of the pleaded case for the parties resolved the issue that fell for adjudication before the Industrial Court into what the profession has come to call as a 'constructive dismissal'. There is no magic in the phrase. It simply means this.

An employer does not like a workman. He does not want to dismiss him and face the consequences. He wants to ease the workman out of his organisation. He wants to make the process as painless as possible for himself. He usually employs the subtlest of means. He may, under the guise of exercising the management power of transfer, demote the workman. That is what happened in *Wong Chee Hong*. Alternatively, he may take steps to reduce the workman in rank by giving him fewer or less prestigious responsibilities than previously held. Generally speaking, he will make life so unbearable for the workman so as to drive the latter out of employment. In the normal case, the workman being unable to tolerate the acts of oppression and victimisation will tender his resignation and leave the employer's services. The question will then arise whether such departure is a voluntary resignation or a dismissal in truth and fact.

In the normal case, an employer either dismisses the servant for cause or terminates the employment under a contractual provision that provides for notice or termination. As a matter of law, the Industrial Court is unconcerned with labels. It does not matter that the parties refer to the particular severance of the relationship as a termination or a dismissal. It is for the Industrial Court to make the determination. Having found that there was in fact a dismissal or the bona fide exercise of the contractual power to terminate, the Industrial Court must, in the former case, decide whether the dismissal was for just cause or excuse. If, on the other hand, it comes to the

conclusion that there was a bona fide termination, then *cadit quaestio.* As Raja Azlan Shah CJ, (Malaya) observed in *Goon Kwee Phoy v J & P Coats (M) Sdn Bhd* [1981] 2 MLJ 129 at p 136:

> We do not see any material difference between a termination of the contract of employment by due notice and a unilateral dismissal of a summary nature. The effect is the same and the result must be the same. Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it.

The task is no different where a case of constructive dismissal is alleged. The Industrial Court must in such a case also determine firstly whether there was a dismissal. And secondly, whether that dismissal was with just cause or excuse. That is the statutory formula employed by s 20(1) of the Act.

Constructive dismissal can take place, as we have attempted to demonstrate, in a number of cases. Since human ingenuity is boundless, the categories in which constructive dismissal can occur are not closed. Accordingly, a single act or a series of acts may, according to the particular and peculiar circumstances of the given case, amount to a constructive dismissal. There are cases which fall as illustrations at either end of the spectrum.

An example of a case where a single act of oppression or victimisation may amount to a constructive dismissal is *Wong Chee Hong.* There, the Supreme Court held the workman's refusal to accept a transfer to be justified on the ground that it amounted to a constructive dismissal. Salleh Abbas LP, delivering the judgment of the court said at p 96:

> Thus in our judgment the transfer, which relegated the applicant to a position of lesser responsibilities, albeit on the same terms and conditions of service, which transfer the appellant refused to accept, is a dismissal. It clearly shows that not only the respondent company was displeased with the appellant but it also exhibited the respondent company's intention not to be bound by the contract any longer. Such relegation of responsibility with its consequent humiliation and frustration and loss of estimation amongst his fellow employees made it impossible for the appellant to carry on being employed under the respondent company's organisation. In other words, he had been driven out of his employment. This is therefore a dismissal (See *Cox v Philips Industries Ltd* [1975] 1 WLR 638 and *JF Bumpus v Standard Life Assurance Co Ltd* [1974] IRLR 232).

Woods v WM Car Service Ltd (Peterborough) Ltd [1982] ICR 693 illustrates a case at the other end of the spectrum. In that case, Brown-Wilkinson J observed as follows:

> In our view it is clearly established that there is implied in a contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: *Courtaulds Northern Textiles Ltd v Andrew* [1979] IRLR 84. To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it: see *British Aircraft Corporation Ltd v Austin* [1978] IRLR 347. The conduct of the parties has to be looked at as a whole and its cumulative impact assessed: *Post Office v Roberts*.

Turning once again to the pleadings, it is abundantly clear that the appellant was complaining that he had been driven out of employment whereas the respondent was contending that the former had left of his own volition. Whether one would describe the conduct complained of as amounting to constructive dismissal or the breach of the implied term governing mutual trust and confidence is really a matter of semantics. Nothing turns upon it. At the end of the day, the question simply is whether the appellant was driven out of employment or left it voluntarily. Upon that question, the pleadings in the present instance are sufficiently precise.

Ms Seah has drawn our attention to passages in well-established authorities which hold that material facts may be pleaded without the legal consequences following them. We would gratefully adopt what was said by Scrutton LJ, in *Lever Bros Ltd v Bell* [1931] 1 KB 557 at pp 582–583:

> The practice of the Courts is to consider and deal with the legal result of pleaded facts, although the particular legal result alleged is not stated in the pleading.

We would add that even at common law, the rule as to pleadings is observed as a matter of giving notice to one's opponent of the points that are being taken in support of one's case. As Raja Azlan Shah CJ (Malaya) put it in *KEP Mohamed Ali v KEP Mohamed Ismail* [1981] 2 MLJ 10 at p 12:

> As one of the objects of modern pleadings is to prevent surprise, we cannot for one moment think that the defendant was taken by surprise. *To condemn a party on a ground of which no material facts have been pleaded may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded.* (Emphasis added.)

It is of course not open to an Industrial Court to decide a dispute without having any regard whatsoever to the pleadings. In *R Rama Chandran v Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, Eusoff Chin Chief Justice said (at p 178):

> It is trite law that a party is bound by its pleadings. The Industrial Court must scrutinize the pleadings and identify the issues; take evidence; hear the parties' arguments and finally pronounce its judgement having strict regards to the issues. It is true that the Industrial Court is not bound by all the technicalities of a civil court (s 30 of the Industrial Relations Act 1967) but it must follow

> the same general pattern. The object of pleadings is to determine what are the issues and to narrow the area of conflict. The Industrial Court cannot ignore the pleadings and treat them as mere pedantry or formalism, because if it does so, it may lose sight of the issues, admit evidence irrelevant to the issues or reject evidence relevant to the issues and come to the wrong conclusion. The Industrial Court must at all times keep itself alert to the issues and attend to matters it is bound to consider. In this case, the Industrial Court had totally failed to consider the allegations of misconduct but simply concluded that because the letter of termination was grounded on retrenchment exercise, it is not bound, and therefore, not obliged to consider the issues of bias and misconduct.

However, it is to be noted that earlier on in the same judgment, the learned Chief Justice made the following observation at p 177:

> It is clear that the claimant, had in his statement of case before the Industrial Court, raised the issue of bias, although the word 'bias' was not actually used.

Having regard to the nature of the allegations made and the contentions raised by either side in their written case and reply, we are satisfied that the finding by the Industrial Court on the implied term point was not one that offended any rule of pleading. It follows that the learned judge was quite wrong in acting upon that ground to quash the award. We are satisfied that had the learned judge addressed his mind to the issues that arose upon a joinder of the parties' pleadings, he would not have came to the conclusion that he did.

For these reasons, we find ourselves in disagreement with the learned judge on this point.

Conflicting findings

Mr Sivabalah has, as we earlier observed, drawn our attention to certain passages in the award which he says consists of findings in his client's favour. Ms Seah's contention is that these are not findings at all but a mere recitation of the case as put by the respondent to the learned chairman during argument. It is true that the passages could have been more happily worded, at least by way of introduction. But, having scrutinized the award with great anxiety and care, we are unable to agree with Mr Sivabalah that there had been any positive findings made in his client's favour. The award when read as a whole is not ambiguous. In the first part it adverts to the factual background and to the rival contentions advanced by the parties. It is then followed by a discussion of the authorities and evidence and ends with the conclusion to which we have earlier referred. This is not a case therefore of an ambiguous award at all. It follows that there is nothing in the point taken.

Appellate interference

Mr Sivabalah in supporting the learned judge's judgement has relied on two decisions of this court. The first of these is *Amanah Butler (M) Sdn Bhd v Yike Chee Wah* [1997] 1 MLJ 750 where we upheld the decision of the High

Court quashing an award on the ground the Industrial Court had failed to take into account certain documents that were relevant and material to the decision-making process. The second case is *Swedish Motor Assemblies Sdn Bhd v Hj Md Ison bin Baba* [1998] 2 MLJ 372 also a case of constructive dismissal, being a resignation under duress. It was held in that case that the High Court had not exceeded its jurisdiction by reviewing an award for substance.

Our response to counsel is that each case depends upon its own facts for the appropriate legal result. It is to be noted that neither *Amanah Butler* nor *Swedish Motor Assemblies* were cases that turned upon credibility of evidence. Such findings are in our judgement immunized from judicial review: *William Jacks & Co (M) Sdn Bhd v S Balasingam* [1997] 3 AMR 2585. Whether a High Court has exercised appellate functions depends upon the approach taken in a particular case. If a judge to whom application is made for certiorari inquires into and disturbs findings of fact based on the credibility of witnesses, he does indeed exercise appellate functions. It is important to remember that in judicial review proceedings the High Court must accept as gospel findings of fact made by the Industrial Court based on credibility of witnesses. As was observed by Mohd Azmi FCJ in *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal* [1995] 2 MLJ 753 at p 757:

> In exercising judicial review, the High Court was obliged not to interfere with the findings of the Industrial Court unless they were found to be unreasonable, in the sense that no reasonable man or body of men could reasonably come to the conclusion that it did, or that the decisions of the Industrial Court looked at objectively, were so devoid of any plausible justification that no reasonable person or body of persons could have reached them (see Lord Denning's judgment in *Griffiths (Inspector of Taxes) v JP Harrison (Watford) Ltd* [1962] 1 All ER 909 at p 916, and judgment of Lord Diplock in *Bromley London Borough Council v Greater London Council & Anor* [1983] 1 AC 768 at p 821; [1982] 1 All ER 153 at p 159; [1982] 2 WLR 92 at p 100).

It is the ultimate decision of the Industrial Court when looked as a whole that matters. That is the approach suggested by so learned a judge as Mohd Azmi FCJ (as he was then). It is a view plainly binding upon this court. Unfortunately, the learned judge in the present appeal overlooked the limits to the jurisdiction he was called upon to exercise. Having very carefully read his judgment we are satisfied that there is merit in Ms Seah's argument. This is, in our judgment, a case in which the parameters of certiorari jurisdiction had been exceeded. This is not a mere case of review for substance but one of appellate interference.

Erroneous test

A word about the test applied by the Industrial Court. As we had earlier said, the learned judge found that the Industrial Court had exceeded its jurisdiction by applying the wrong test. We have, during the discussion of the pleading point adverted to the test applied by the learned chairman. It

is patently clear, that he asked himself the correct question, namely, whether the appellant had been dismissed without just cause or excuse. In answering that question, the learned judge found that the respondent had breached the implied term of trust and confidence. This is really a shorthand way of applying the repudiation test formulated in *Wong Chee Hong v Cathay Organization*. The Industrial Court did not therefore err on this count.

The upshot

For the reasons already given, the appeal must be allowed. The order made by the learned judge is set aside. The award of the Industrial Court is restored to file. The respondent must pay the costs of this appeal here and of the proceedings in the court below. The deposit is to be refunded to the appellant.

Appeal allowed.

Reported by Wong Siok Chin